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No. 83-919

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D., 1983

BOB D. PITCHFORD,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

NEIL F. HARTIGAN
Attorney General
State of Illinois
MARK L. ROTERT
MICHAEL VUJOVICH
JAMES V. CINOTTO
Assistant Attorneys General
500 South Second Street
Springfield, IL 62706
(217) 782-1090

MICHAEL V. ACCETTURA
Assistant Attorney General
Attorney of Record.

SCHNEPP & BARNES PRINTERS, INC., SPRINGFIELD, ILL.

QUESTIONS PRESENTED FOR REVIEW

Whether this Court should review a federal constitutional issue where the judgment below is supportable on independent state grounds.

Whether this Court should review a claim that was not pressed or passed upon in the Illinois Appellate Court.

Whether this Court should review the Illinois Appellate Court's interpretation of the Illinois Eavesdropping Statute.

Whether the State's eavesdropping application contained sufficient information to establish probable cause for the trial court to issue an eavesdropping order.

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OPINION BELOW

The opinion of the Appellate Court of Illinois, Fifth District, in this case was entered on April 26, 1983. The Illinois Supreme Court denied leave to appeal on October 4, 1983. The opinion of the Appellate Court of Illinois is reported at 115 Ill. App. 3d 164, 450 N.E.2d 349 (1983).

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3). However, as treated more fully in the argument contained herein, petitioner has not shown any

reason for this Court to exercise discretion to grant the petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS

Petitioner relies on the Fourth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner was charged on December 7, 1981, with official misconduct, obstructing justice, solicitation to obstruct justice, and obstructing a police officer. These charges resulted from evidence obtained with an eavesdropping device.

The eavesdropping order was issued by the Circuit Court of Williamson County on December 3, 1981. The application for the eavesdropping device stated in relevant part:

> On December 3, 1981, at approx. 10:15 A.M., Jefferson Co. Sheriff Bob D. Pitchford advised Wilbert E. Tobias, whom the Sheriff believes to be involved in gambling activity, to tell his friends to "pull back, the town's full of state police and treasury agents."

The petition further stated that Tobias would recontact the petitioner to inquire further into their conversation of that date. The application requested that the eavesdropping device be used from 6:00 p.m. that day until 6:00 p.m. on December 6, 1981.

Other documents submitted to the Circuit Court of Williamson County included the State's Attorneys' Authorization approving the use of the device and Wilbert Tobias' written consent allowing his conversation to be recorded. The State's Attorney's authorization was signed at 6:30 p.m. on December 3, 1981. Tobias' consent form was signed at 6:47 p.m. that day. The eavesdropping order was issued by the court at 7:48 p.m.

Later that night, two telephone conversations between Tobias and the petitioner were recorded. These recordings led to the criminal charges against the petitioner.

On April 12, 1982, the Circuit Court of Jefferson County granted the petitioner's motion to suppress the recordings. The trial court ruled that the documents submitted to the circuit court were facially deficient in three ways. First, the State's Attorney's authorization for the use of an eavesdropping de-

vice was signed by the State's Attorney a few minutes before Tobias signed a written consent form. Second, the eavesdropping device failed to state reasonable cause. Third, time limits authorized by the order had begun to run by the time the order was signed.

On April 26, 1983, the Appellate Court of Illinois, Fifth District, reversed the order of the circuit court. *People v. Pitchford*, 115 Ill. App. 3d 164, 450 N.E.2d 349 (1983). The appellate court found that the fact that Wilbert Tobias signed a consent form seventeen minutes after the State's Attorney signed his authorization did not vitiate Tobias' consent to the eavesdropping. The Court further held that the State's eavesdropping application was not facially insufficient to establish reasonable cause. Finally, the Court found that any error created by the inconsistency in the stated time of the order was only technical and did not warrant suppression of the evidence. The Court remanded the cause to the circuit court for further proceedings.

On October 4, 1983, the Illinois Supreme Court denied petitioner's petition for leave to appeal.

REASONS FOR DENYING THE WRIT OF CERTIORARI

THE JUDGMENT BELOW IS SUPPORTABLE ON INDEPENDENT STATE GROUNDS, THUS RENDERING THE CONSTITUTIONAL ISSUES NOT APPROPRIATE FOR REVIEW BY THIS COURT.

The trial court suppressed the court authorized tape-recorded conversations between the petitioner and an informant on the grounds that the court order was issued in violation of the Illinois Eavesdropping Statute, Ill. Rev. Stats., 1981, ch. 38, § 108A-1, *et seq.*; 108A-3; 108A-3(a); 108A-4; 108A(a) and 108A-5. As recognized by the petitioner in his petition for leave to appeal to the Illinois Supreme Court, the "trial judge did not say he was granting the suppression motion for constitutional reasons." Petition for Leave to Appeal at 7. Similarly, the Appellate Court of Illinois, Fifth District, did not rest its decision on constitutional grounds. Rather, the Court found that the documents submitted to the circuit court to obtain the eavesdropping order was sufficient to satisfy the statutory requirements of the Illinois Eavesdropping Statute. The opinion of the Illinois Appellate Court does not even mention the Fourth or Fourteenth Amendments to the United States Constitution. Thus, the judgment of the Illinois Appellate Court is correct on the basis of state law alone. Accordingly, it would be inappropriate for this Court to grant certiorari and decide constitutional issues which are not necessary to the resolution of the case. See *Cousins v. Wigoda*, 419 U.S. 477, 486-87 (1975).

THIS COURT SHOULD NOT REVIEW PETITIONER'S FOURTH AMENDMENT CLAIM SINCE IT WAS NOT PRESSED OR PASSED UPON IN THE ILLINOIS APPELLATE COURT.

This Court has long held that its certiorari jurisdiction extends only to those federal questions that have been both raised and decided in the state court below. *Crowell v. Randell*, 10

Pet. 368, 391, 9 L.Ed. 458 (1836); *McGoldrick v. Compaignee Generale*, 309 U.S. 430, 435-436, 84 L.Ed. 849 (1940); *State Farm Mutual Insurance Co. v. Duel*, 324 U.S. 154, 160, 65 S.Ct. 573 (1945). This "not pressed or passed upon below" rule was recently reaffirmed by this Court in *Illinois v. Gates*, 103 S.Ct. 2317 (1983).

The requirement that a federal question be raised and decided in the state court below has not been met in the instant case. As recognized by the petitioner in his Petition for Leave to Appeal to the Illinois Supreme Court, "the trial judge did not say he was granting the suppression motion for constitutional reasons." Petition for Leave to Appeal at 7. Similarly, the decision of the Illinois Appellate Court did not rest on constitutional grounds. Rather, the Court found that the documents submitted to the circuit court to obtain the eavesdropping device were sufficient to satisfy the statutory requirements of the Illinois Eavesdropping Statute. Thus, it is clear that the Illinois Courts did not address the question of whether the petitioner was denied his constitutional rights under the Fourth and Fourteenth Amendments.

Moreover, petitioner failed to raise his federal constitutional issue in the Illinois courts. His petition for leave to appeal to the Illinois Supreme Court argued only that "the trial court correctly suppressed two tapes of electronically overheard and recorded conversations where both conversations were overheard and recorded pursuant to a court order which was issued in violation of the Illinois Eavesdropping Statute." Petition for Leave to Appeal at 2. Specifically, the Fourth and Fourteenth Amendments to the United States Constitution were not cited in his petition. Petitioner's failure to raise this federal question in the Illinois courts precludes him from raising the issue in the instant petition for a writ of certiorari.

Therefore, Respondent submits that this Court should not grant a writ of certiorari to review an issue not addressed by the

Illinois Appellate Court or raised in the state courts by the petitioner.

THIS COURT SHOULD NOT REVIEW THE ILLINOIS APPELLATE COURT'S INTERPRETATION OF THE ILLINOIS EAVESDROPPING STATUTE.

Petitioner contends that the State's Attorneys' authorization must precede the informant's consent. He further argues that the entry of the eavesdrop order within the time limit specified in the court order contravened the procedural requirements of the Illinois Eavesdropping Statute. Significantly, petitioner does not attack the validity or the constitutionality of the Illinois Eavesdropping Statute. Rather, petitioner's arguments are premised on the construction of the Illinois Eavesdropping Statute.

This Court has long held that the Supreme Court lacks jurisdiction to construe state legislation. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 91 S.Ct. 1400 (1971). A decision of a state court resting upon the construction and not the validity of a statute does not present a federal question. *Grand Gulf Railroad v. Marshall*, 53 U.S. 165 (1851); *Snell v. Chicago*, 152 U.S. 191, 14 S.Ct. 489 (1894); *Fury v. King County*, 141 U.S. 668, 12 S.Ct. 128 (1891).

Thus, the instant petition does not present a federal question and this Court should deny certiorari.

THE STATE'S EAVESDROPPING APPLICATION CONTAINED SUFFICIENT INFORMATION TO ESTABLISH PROBABLE CAUSE FOR THE TRIAL COURT TO ISSUE AN EAVESDROPPING ORDER.

Petitioner argues that the application for an eavesdropping device contained insufficient information to justify a finding of probable cause to believe that felonies had been committed. In support of this argument petitioner cites this Court's opinion in

Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509 (1969), where this Court held that an affidavit must contain some of the underlying circumstances indicating that the informant was credible or that his information was reliable. *Id.* at 114. Petitioner suggests that the application in the instant case was insufficient because the trial court was not informed of the underlying circumstances indicating that the informant Tobias was reliable.

This Court recently abandoned the "two-pronged" test of *Aguilar* and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584 (1969) in *Illinois v. Gates*, 103 S.Ct. 2317 (1983). In its place, the Court substituted the "totality of the circumstances" analysis that traditionally has informed probable-cause determinations. Under the "totality of the circumstances" test, the application in the instant case clearly showed sufficient reasonable cause for issuance of the eavesdropping order.

The application indicates that the informant believed the sheriff "to be involved in gambling." Moreover, as recognized by the Illinois Appellate Court,

> The State's application quotes the sheriff as saying to informant Tobias, "pull back, the town's full of state police and treasury agents." Only a contorted interpretation of this statement would allow the conclusion that the sheriff's remarks did not concern the concealment of illegal activity from police detection. This conduct by a law enforcement official established reasonable cause for the circuit judge to believe that a felony either had already been committed, or was about to be committed.

People v. Pitchford, supra, 450 N.E.2d at 352.

Thus, the State's eavesdropping application contained sufficient information to establish probable cause for the trial court to issue the eavesdropping order. This Court should deny the petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, the People of the State of Illinois respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General
State of Illinois

MARK L. ROTERT
MICHAEL VUJOVICH
JAMES V. CINOTTO
Assistant Attorneys General
500 South Second Street
Springfield, IL 62706
(217) 782-1090

MICHAEL V. ACCETTURA
Assistant Attorney General
Counsel of Record.

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